Supreme Court, U.S.
FILED
SEP 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-2054

In The

Supreme Court of the United States

October Term, 1988

Dennis M. O'Connor, et al.,

Petitioners,

vs.

Estate of Marilyn Marie Conners, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT BROWN
BROWN & FINNEY

JOHN HOUSTON SCOTT
LAW OFFICES OF JOHN HOUSTON SCOTT

Attorneys for Respondents

Counsel of Record:
JOHN HOUSTON SCOTT
LAW OFFICES OF JOHN HOUSTON SCOTT
433 Turk Street
San Francisco, CA 94102
Telephone: (415) 775-3900

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. The distinction between the professional judgment standard enunciated in *Youngberg v. Romeo*, 457 U.S. 307 (1982) and the deliberate indifference and/or gross negligence standards.

2. Whether the counter declaration of Dr. William Schwartzman raised genuine issues of fact that cannot be properly decided on a motion for summary judgment.

LIST OF PARTIES

Respondents: Estate of Marilyn Marie Conners; Howard Meredith; Lillian Beatty.

Petitioners: Dennis M. O'Connor; Fred Valenzuela; Stephen Donoviel; Thaddeus Kostrubala.

TABLE OF CONTENTS

Page

Questions Presented i

Opinions Below 1

Statement Of The Case 2

Argument 9

I

Introduction 9

II

The Constitutionally Protected Liberty Interest To Safe Conditions Of Confinement 10

III

The Professional Judgment Standard 12

IV

The Ninth Circuit Correctly Recognized The Existence Of A Genuine Issue Of Fact In Dispute Precluding Summary Judgment 17

V

Petitioners Misrepresent The Applicable Law In Other Circuits 19

VI

Sanctions Should Be Imposed Pursuant To Rule 11 21

TABLE OF AUTHORITIES

Page

CASES

Archie v. City of Racine, 826 F.2d 480 (7th Cir. 1987) 19, 20

Bowers v. Devito, 686 F.2d 616 (7th Cir. 1982) 11, 21

Bradberry v. Pinellas County, 789 F.2d 1513 (11th Cir. 1986) 19, 20

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662 (1986) 13, 14

Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668 (1986) 13, 14

Doe v. New York City Department of Social Services, 649 F.2d 134 (2nd Cir. 1981), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195 (1983) 14

Escamilla v. Santa Anna, 796 F.2d 268 (9th Cir. 1986) 11, 14

Estelle v. Gamble, 429 U.S. 97 (1976) 13, 14, 15, 16

Humphrey v. Cady, 405 U.S. 504 (1972)..... 10

Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401 (1977) 11, 12

Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981), *cert. denied*, 453 U.S. 950, 102 S.Ct. 27..... 15

Jones v. North Carolina Prisoners Labor Union, 433 U.S. 119, 97 S.Ct. 2532 (1977) 10

TABLE OF AUTHORITIES–Continued

Page

Little v. Walker, 552 F.2d 993 (7th Cir. 1977), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507 (1978) 15

Martin v. White, 742 F.2d 469 (8th Cir. 1984) 15

Meechum v. Fano, 427 U.S. 215, 96 S.Ct. 2532 (1976) 10

Mitchell v. Forsyth, 472 U.S. 511 (1985) 17, 18

Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151 (1972) 17

Monroe v. Pape, 365 U.S. 167 (1961) 13, 17

O'Conner v. Donaldson, 422 U.S. 563 (1975) 10, 11

Owen v. City of Independence, 445 U.S. 622 (1980) 17

Rankin v. City of Wichita Falls, 762 F.2d 444 (5th Cir. 1985) 14, 19, 20

Revere v. Massachusetts General Hospital, 463 U.S. 239, 103 S.Ct. 2979 (1983) 15

Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988) 4

Specht v. Patterson, 386 U.S. 605 (1967) 11

Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) .. 14, 21

Vinson v. Campbell County Fiscal Court, 820 F.2d 194 (6th Cir. 1987) 14

Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254 (1980) 10

TABLE OF AUTHORITIES–Continued

Page

Walsh v. Brewer, 733 F.2d 473 (7th Cir. 1984) 14

Watts v. Laurent, 774 F.2d 168 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1466 (1985) 15

White v. Rochford, 592 F.2d 381, 387 (7th Cir. 1982) 14, 21

Withers v. Levine, 615 F.2d 158 (4th Cir. 1980), *cert. denied*, 449 U.S. 849, 101 S.Ct. 136 (1980) 15

Wolff v. McDonnell, 418 U.S. 558, 94 S.Ct. 2935 (1974) 10, 15

Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452 (1982) ..... *passim*

UNITED STATES CONSTITUTION

Eighth Amendment 14, 15, 16

Fourteenth Amendment 10, 12, 15, 16, 17

No. 87-2054

In The

Supreme Court of the United States

October Term, 1988

Dennis M. O'Connor, et al.,

Petitioners,

vs.

Estate of Marilyn Marie Conners, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Estate of Conners v. O'Connor*, 846 F.2d 1205 (9th Cir. 1988) and the decision of the United States District Court for the Northern District of California (Appendix 2 to the Petition).

STATEMENT OF THE CASE

1. Nature Of The Controversy

The decedent, Marilyn Marie Conners, was an attractive young woman admitted to Napa State Hospital prior to 1985. Due to a physical injury rendering her mentally disabled, she had the personality and intellectual capacity of a three year old. She was virtually helpless and unable to protect herself from adult manipulation and sexual aggressiveness.

Prior to and during 1985, John Lewis Duncan, a penal code patient, was confined at Napa State Hospital following a not-guilty by reason of insanity plea to a charge of rape and murder of a young woman. Following his admission, Mr. Duncan had physically threatened patients with violence and been found in possession of a knife, illegal narcotics and other contraband.

Petitioners knew or should have known that Mr. Duncan was not a suitable patient for Napa State Hospital. Mr. Duncan should have been transferred to Atascadero State Hospital, a prison facility specifically designated for the treatment of dangerous penal code patients and sex offenders.

On April 27, 1985, Mr. Duncan was permitted to roam the hospital grounds, unsupervised, pursuant to official and *de facto* policies then in effect. On that same date, Marilyn Marie Conners was allowed to leave her locked ward. Mr. Duncan enticed her to a remote area of the hospital grounds, where he raped and strangled her with her rosary bead necklace. Mr. Duncan thereafter left

her nude body with her hands tied behind her at approximately the same location where he had two to three weeks earlier assaulted and attempted to rape another female patient.

In their Complaint, Respondents alleged that Petitioners were grossly negligent and deliberately indifferent to patient safety by implementing and maintaining written and *de facto* policies that foreseeably resulted in the tragic death of Marilyn Conners. These policies included:

1. The admission of penal code patients to Napa State Hospital;

2. The failure to segregate penal code patients from non-penal code patients; and

3. The arbitrary granting of grounds privileges (P-Cards) to penal code patients at Napa State Hospital.

The Respondents contend that these and other practices constitute evidence of deliberate indifference/gross negligence and are such a substantial departure from professional standards as to violate Marilyn Conners' constitutional right to a safe environment while confined under state authority. *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1982).

For several years prior to the rape and murder of Marilyn Conners, Napa State Hospital administrators, including the Petitioners herein, permitted the admission of criminally insane patients to Napa State Hospital who had committed rape, murder and mayhem. These patients, known as penal code or "P.C." patients, were confined at Napa State Hospital because they had either

demonstrated incompetence to stand trial due to mental illness or because of a determination that they were not guilty by reason of insanity.

Petitioners contend that Napa State Hospital's practices and policies of admitting Penal Code patients included thorough evaluations of the risk individual Penal Code patients posed to other patients. According to Petitioners, the Medical Director reviewed all risk assessments upon admission. However, according to Dr. William Schwartzman,[1] a long-time Napa State Hospital physician and the decedent's treating physician, the Hospital's practice regarding the admission of Penal Code

---

1. Dr. Schwartzman was employed at Napa State Hospital from 1963 through 1985. His extensive experience with treating violent mental patients includes ten years (1969-1979) on the psychiatric emergency service at San Francisco General Hospital. Dr. Schwartzman worked intensively with 100's of Penal Code patients between the years 1978 through 1984 at Napa State Hospital. Additionally, he was in charge of the Hospital's "maximum security unit" (A-5) for approximately 15 months from September 1981 to November 1982, during which time he treated, managed and assessed a large number of penal code patients and observed the assessment of these patients by other units and wards. Furthermore, in 1983, he was the psychiatric expert to State Senator Barry Keene, then Chairman of the California Senate Judiciary Committee, and testified concerning legislation pertaining to violent mental patients in the states' institutions. The Hospital terminated Dr. Schwartzman in May of 1985, within days after he publicly criticized the Hospital administration regarding the death of Marilyn Conners. *See, generally, Schwartzman v. Valenzuela*, 846 F.2d 1209 (9th Cir. 1988).

patients was contrary to the written policies and the representations contained in Petitioners' declarations.

In his declaration, Dr. Schwartzman states,

> All patients, including penal code patients, during the years 1981 - 1985 (and perhaps earlier and later) were seen briefly in the Admitting Suite upon arrival. With the exception of immediate, overt, and imminent violence or assaultiveness, they were not segregated in terms of past violent history or legal status.

(Schwartzman Declaration, paragraph 32).

Petitioners represent that "following admission to Napa State Hospital, Penal Code patients were kept segregated from the general patient population at Napa State Hospital, in locked wards." However, it is undisputed in the record below that Penal Code patients were not segregated from the civilly committed patient population:

> Napa State Hospital administration . . . (has) been indifferent to the known risks of mixing Penal Code and LPS patients together . . . With the exception of immediate, overt, and imminent violent or assaultiveness, they (Penal Code patients) were not segregated in terms of past violent history or legal status.
>
> Hence, patients with histories of considerable violence, whether including a current or prior Penal Code status, are mixed with disabled, retarded, brain damaged, helpless and non-violent patients.
>
> Napa State Hospital has been glaringly deficient in developing *any* kind of special treatment programs for the Penal Code group of patients in particular. These patients, who have special histories, legal circumstances and (by definition) virtually 100% association of their mental illness with violent and serious crime, were, until my departure in May 1985, housed on a multitude of wards, mixed with an array

> of patients with enormously varying problems and conditions, and as a consequence, given *no* special counseling, treatment or behavioral programs that were directed specifically at their violent proclivities or histories.

(Schwartzman Declaration, paragraphs 19, 27, 32).

Petitioners further argue that Penal Code patients only obtained grounds privileges (called a "P-Card") following a thorough analysis and assessment of the Penal Code patient's risk factor. However, while the Napa State Hospital written policy sets forth certain criteria, Dr. Schwartzman's declaration establishes that, in fact, this policy (Policy Directive No. 780) was not adhered to and that a wholly inadequate *de facto* policy existed. In fact, typically no professional assessment was made by any trained staff member or group of staff members to determine when a Penal Code patient met or failed to meet written policy criteria.

In his declaration, Dr. Schwartzman states:

> I completely disagree with Mr. Donoviel's declaration that Penal Code patients receive an adequate or meaningful assessment of their 'behavior, history, potential for dangerous behavior, potential for aggressive or assaultive behavior or for sexual acting out or unauthorized absence' as Policy Directive 780 requires.
>
> In my experience, hospital staff had received absolutely no in service training upon becoming employees, nor during their work here (during the years I worked on acute adult wards at Napa State Hospital) in the assessment of these particular elements, in mental patients in general, or in Penal Code patients in particular.

> It is my professional opinion that Napa State Hospital's functional assessment process for Penal Code patients to obtain grounds privileges is haphazard, indiscriminate, variable, and frequently conducted by staff with little experience in this particular assessment. As a consequence, it is my opinion and experience that there are many dangerous patients who slip through this process and wrongfully, on clinical and common sense grounds, obtain grounds privileges.
>
> Because of an absence of any specific unit or therapeutic setting of which the specific needs in terms of violence potential of the Penal Code patient can be assessed, such patients are often given grounds passes on faith and hope more than on a reasonable or professional assessment of their likelihood to act out their violent urges and emotions. This is the real or *de facto* policy, not as stated in Policy Directive No. 780.

(Schwartzman Declaration, paragraphs 14, 15, 21, 31).

Petitioners further allege that Napa State Hospital administrators had investigated and discovered that "as a group, Penal Code patients were less violent and assaultive than other patients at Napa State Hospital." (Petition, p. 4). However, as explained by Dr. Schwartzman, "The kind of assault that Marilyn Conners was the victim of is much more frequently committed by Penal Code patients than LPS patients." (Schwartzman Declaration, paragraph 29).

2. Proceedings Below

Petitioners brought a motion to dismiss the original Complaint which was granted with leave to amend. In response to Respondents' First Amended Complaint,

Petitioners brought a motion to dismiss or, in the alternative, a motion for summary judgment.

During that period of time, the Respondents were only allowed to conduct limited discovery. The Petitioners maintained that the Respondents were not entitled to conduct discovery because, in deciding on qualified immunity, the court need only determine whether the law was clearly established and need not consider factual disputes.

The District Court denied the motion for summary judgment, finding that the law was clearly established and that the counter declaration of Dr. Schwartzman raised triable issues of fact.

The Ninth Circuit affirmed, and held that "the facts alleged in the Schwartzman affidavit, if proven, could reasonably support the trier's finding that the Defendants were indifferent to patient safety and had made 'such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that (they) actually did not base the decision on such a judgment.' *Youngberg v. Romeo*, 457 U.S. at 323. The affidavits presented by the Defendants contradicted Dr. Schwartzman's claims. The pleadings and affidavits thus presented a genuine issue of fact." *Estate of Conners v. O'Connor, supra*, at 1209 (9th Cir. 1988).

ARGUMENT

I

INTRODUCTION

The Ninth Circuit's ruling in *Estate of Conners* is not a new test. Rather, the decision is consistent with *Youngberg v. Romeo*, 457 U.S. 307 (1982) and prior United States Supreme Court holdings interpreting the constitutional liberty interests of mental patients and liability standards applied in state custodial settings under 42 U.S.C. Section 1983.

The Petitioners grossly distort and misstate the facts as contained in the record on appeal. The Petitioners also erroneously contend that other circuits' opinions are inconsistent with the Ninth Circuit decision. The Ninth Circuit ruling is entirely consistent with other circuit courts of appeals' decisions regarding the standard of liability in custodial situations under Section 1983.

The Respondents' theory of liability is not predicated upon a difference of professional opinion between a hospital physician and hospital administrators regarding the appropriate assessment of violence and dangerousness in Penal Code patients. Rather, Respondents raise issues regarding the absence of the exercise of professional judgment in the hospital's practices and policies, including admitting and not segregating Penal Code patients, granting unsupervised ground privileges to Penal Code patients, and relying on untrained hospital staff to assess Penal Code patients' potential for dangerous behavior.

II

THE CONSTITUTIONALLY PROTECTED LIBERTY INTEREST TO SAFE CONDITIONS OF CONFINEMENT

The Fourteenth Amendment to the United States Constitution, Due Process Clause provides:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

This court has repeatedly stated that the purpose of the Fourteenth Amendment's Due Process Clause is to protect individuals against abuses of governmental power. As the court noted in *Wolff v. McDonnell*, 418 U.S. 558, 94 S.Ct. 2975 (1974),

> The touchstone of due process is protection of the individual against arbitrary acts of government.

Petitioners contend that mental patients' conditions of confinement do not raise matters of constitutional concern. However, in *Wolff v. McDonnell, supra*, 94 S.Ct. at 2974, this court struck down the state's identical argument as "plainly untenable," declaring, "There is no iron curtain drawn between the constitution and the prisons of this country." *See, Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119, 129, 97 S.Ct. 2532, 2540 (1977); *Meechum v. Fano*, 427 U.S. 215, 225, 96 S.Ct. 2532, 2538 (1976).

This Court has held that involuntary detention necessarily implicates constitutional rights. Confinement of an individual entails a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254 (1980). These principles apply to involuntary confinements in mental hospitals. As this court noted in *O'Conner v. Donaldson*,

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law.

O'Conner v. Donaldson, 422 U.S. 563, 580 (1975) (Burger, concurring), *citing*, *Specht v. Patterson*, 386 U.S. 605, 608 (1967).

Similarly, the mere fact that an individual has been committed to a state mental institution under proper procedures does not deprive a person of his or her substantive liberty interests under the Fourteenth Amendment. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

As a general matter, the state bears no constitutional duty to provide substantive services to its residents. However, when persons are committed to state institutions, the state assumes certain duties and obligations. *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). These duties arise out of the custodial relationship between the state and the incarcerated individual. As succinctly stated in *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982),

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be hard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

See also, *Escamilla v. Santa Anna*, 796 F.2d 268 (9th Cir. 1986).

Prior to *Youngberg*, the Supreme Court recognized the constitutional right to safe conditions of confinement. In *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413 (1977), this court declared that "among the historic liberties so protected was a right to be free from and to obtain

judicial relief for unjustified intrusions on personal security."

In *Youngberg v. Romeo, supra,* this Court held that involuntarily committed patients in state institutions have a constitutionally protected liberty interest to reasonably safe conditions of confinement under the Fourteenth Amendment Due Process Clause. Citing to *Ingraham v. Wright, supra,* the *Youngberg* court concluded that mental patients as well as criminals have a liberty interest in a safe environment, stating,

> In the past, this court has noted that the right to personal security constitutes a 'historic liberty interest' protected substantively by the due process clause. And that right is not extinguised by lawful confinement, even for penal purposes.

Id. at 2458.

III

THE PROFESSIONAL JUDGMENT STANDARD

In *Youngberg v. Romeo,* this Court recognized that mental patients' liberty interests in safety are not absolute but must be balanced with the state's duty to provide therapeutic treatment.[2] The Court held that liability arises where a substantial departure from accepted professional judgment, practice or standards exists, stating:

---

2. The right to a safe environment and the right to treatment are not inherently antagonistic or conflicting. These interests are compatible and reinforce each other. A safe environment promotes treatment and appropriate treatment promotes a safe environment. (Lion, John R. & Reid, William H., Editors, Assaults Within Psychiatric Facilities, (1983)).

> The decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323, 102 S.Ct. at 2462 (footnotes omitted).

The Supreme Court's decisions subsequent to *Youngberg* concerning the liability standard in custodial settings for due process violations under 42 U.S.C. Section 1983, *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986), and *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668 (1986), did not change the *Youngberg* standard. In these cases, this Court held that mere negligence does not state a sufficient basis for Section 1983 liability. This Court had previously recognized that negligent conduct is not actionable under Section 1983. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Monroe v. Pape*, 365 U.S. 167 (1961).

In *Daniels* and *Davidson*, this Court expressly did not consider "whether something less than intentional conduct, such as recklessness or 'gross negligence', is enough to trigger the protection of the due process clause." *Daniels v. Williams*, 474 U.S. at 334, n.3; *Davidson v. Cannon*, 106 S.Ct at 360.[3]

---

3. Petitioners erroneously contend that this Court held in *Davidson* that the due process clause only proscribes *intentional* deprivations. In *Davidson*, the plaintiff did not allege anything more than mere negligence. Furthermore, the plaintiff did not challenge the district court's finding that the state officials did not act with deliberate indifference to his needs. 106 S.Ct. at 670. Since the plaintiff merely claimed negligence, this Court held that *Daniels* controlled.

Although this Court in *Daniels* and *Davidson* did not discuss the issue of whether state officials' gross negligence or deliberate indifference imposes liability under Section 1983, courts have previously held that deliberate indifference or gross negligence sufficiently states a Section 1983 claim in non-prisoner custodial settings. *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195 (1983); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987); *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 199-200 (6th Cir. 1987); *White v. Rochford*, 592 F.2d 381, 387 (7th Cir. 1982); *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985); *Escamilla v. Santa Anna*, 796 F.2d 268 (9th Cir. 1986); *Walsh v. Brewer*, 733 F.2d 473 (7th Cir. 1984).

The Ninth Circuit's standard of conscious indifference amounting to gross negligence is in accord with *Youngberg v. Romeo* and this Court's prior decisions. In *Estelle v. Gamble, supra*, 97 S.Ct. at 291, this Court held that "deliberate indifference" to a prisoner's medical needs violates the Eighth Amendment and states a Section 1983 claim. The *Estelle* court defined deliberate indifference as the absence of a physician's exercise of professional judgment:

> Doctors choosing the 'easier and less efficacious treatment' of throwing away the prisoner's ear and stitching the stump may be attributable to *'deliberate indifference . . . ' rather than an exercise of professional judgment.*

Estelle v. Gamble, supra, 97 S.Ct. at 291, n.10. (emphasis added). By definition the exercise of professional judgment does not and cannot include gross negligence or deliberate indifference to a patient's life and health.

Since *Estelle,* courts have applied the "deliberate indifference" standard to cases involving allegations of a deprivation of the right to safety under the Eighth Amendment. *Little v. Walker,* 552 F.2d 993 (7th Cir. 1977), *cert. denied,* 435 U.S. 932, 98 S.Ct. 1507 (1978); *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981), *cert. denied,* 453 U.S. 950, 102 S.Ct. 27 (1981); *Withers v. Levine,* 615 F.2d 158 (4th Cir. 1980), *cert. denied,* 449 U.S. 849, 101 S.Ct. 136 (1980); *Martin v. White,* 742 F.2d 469 (8th Cir. 1984); *Watts v. Laurent,* 774 F.2d 168 (7th Cir. 1985), *cert. denied,* 106 S.Ct. 1466 (1985).

The Due Process Clause provides at least as great protection as provided by the Eighth Amendment. *Revere v. Massachusetts General Hospital,* 463 U.S. 239, 244, 103 S.Ct. 2979, 2983 (1983); *Wolff v. McDonnell,* 418 U.S. 557-558, 94 S.Ct. 2975 (1974). Thus, since "deliberate indifference" triggers the protection of the Eighth Amendment, the standard under the Fourteenth Amendment must be equivalent or lower. Petitioners urge the Court to hold otherwise.

Involuntarily committed mental patients are entitled to the same, if not greater, constitutionally protected liberty interests in safe conditions of confinement as prisoners. In *Youngberg v. Romeo,* 102 S.Ct. at 2458, the Court recognized:

> If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be

> unconstitutional to confine the involuntarily committed – who may not be punished at all – in unsafe conditions.

The *Youngberg* court further stated that:

> *Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals* whose conditions of confinement are designed to punish.

102 S.Ct. at 2461 (emphasis added).

The *Youngberg v. Romeo* court, in setting the professional judgment standard, stated that mental patients deserve greater protections than do criminals. Accordingly, mental patients need not meet a standard higher than the *Estelle* "deliberate indifference" standard in order for liability to attach under Section 1983. The court in *Youngberg* did not intend to articulate a standard that would provide greater protection to criminals than innocent and vulnerable mental patients. The *Youngberg* decision mandates that the scales be tipped in favor of mental patients and the Fourteenth Amendment over comparable or analogous Eighth Amendment guarantees.

Petitioners argue that any standard of liability is inappropriate in this case because state officials administration of state mental hospitals is not a matter of concern for federal courts or the Constitution. Petitioners argue that:

> Federal judges and juries are not able to competently balance relevant state interests involving care and treatment of the mentally ill; and concerns of federalism prohibit the federal judiciary from converting enforcement of the due process clause of the Fourteenth Amendment into a font of tort law.

(Petition, p. 7)

However, this argument blatantly contradicts this Court's recognition of the primary purpose of Section 1983 and the Fourteenth Amendment. *Monroe v. Pape, supra; Owen v. City of Independence,* 445 U.S. 622 (1980).

As stated in *Mitchum v. Foster,* 407 U.S. 225, 242, 92 S.Ct. 2151, 2162 (1972), "The very purpose of Section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights." The protection provided by this statute becomes even more vital concerning mentally disabled persons who, because of their mental illness, are vulnerable and easily victimized.

IV

THE NINTH CIRCUIT RULING RECOGNIZED THE EXISTENCE OF A GENUINE ISSUE OF FACT IN DISPUTE PRECLUDING SUMMARY JUDGMENT

The determination of a qualified immunity claim does not entail a determination of the merits of the Plaintiffs' claim. *Mitchell v. Forsyth,* 472 U.S. 511 (1985):

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law, whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Mitchell v. Forsyth, 472 U.S. at 528, 105 S.Ct. at 2816.

In the prior proceedings, the Respondents objected to the Court entertaining a motion for summary judgment on the merits without first giving the Respondents an opportunity to complete discovery.

Within this context, the Respondents filed the counter declaration of William Schwartzman, M.D., in opposition to Petitioners' Motion for Summary Judgment.

The declaration of William Schwartzman, M.D., does not espouse a particular treatment modality or philosophy. Rather, Dr. Schwartzman's declaration demonstrates the existence of factual disputes going to the ultimate issue of liability in the case.

Notably, the Ninth Circuit observed:

> The plaintiffs rely primarily on the affidavit of Dr. Schwartzman to establish the existence of a factual question of the violation of clearly established rights. A psychiatrist at Napa State Hospital for more than seven years, Dr. Schwartzman also had ten years of experience with violent mental patients. Dr. Schwartzman expressed a professional opinion that the hospital's 'approach in dealing with the assessment and determination of risk from violence, to non-violent patients from violent ones, is grossly and totally inadequate.' He stated that penal code patients are not given special consideration. Because assessment criteria are informal and vague, he continued, 'patients with considerable violence potential are granted ground passes . . . without careful regard to situations likely to evoke their violent tendencies.' Schwartzman stated that hospital staff have received no training on assessment of patients' potential for dangerous behavior. He also claimed that the hospital had been 'glaringly deficient in developing any kind of specialized treatment programs for the Penal

> Code group of patients.' He claimed that, despite a history of violence among penal code patients at the hospital, the hospital staff made no attempt to rectify the problems.

Estate of Conners v. O'Connor, supra, at 1208-1209.

Even under the Petitioners' analysis of *Youngberg,* the Respondents have demonstrated an absence of the exercise of professional judgment entitling them to a trial on the merits.

V

PETITIONERS MISREPRESENT THE APPLICABLE LAW IN OTHER CIRCUITS

On page 11 of their petition, Petitioners state that "the Ninth Circuit's ruling is inconsistent with opinions from other circuits which hold that gross negligence does not violate the due process clause." In support of this statement, Petitioners cite *Bradberry v. Pinellas County,* 789 F.2d 1513 (11th Cir. 1986); *Rankin v. City of Wichita Falls,* 762 F.2d 444 (5th Cir. 1985); *Archie v. City of Racine,* 826 F.2d 480 (7th Cir. 1987).

However, Petitioners' argument grossly misapplies and misrepresents those circuits' holdings. None of the cases cited by Petitioners involved custodial settings. All three cases involved situations raising the issue of state officials' duties and responsibilities owed to the general public. Furthermore, the courts specifically noted that these cases did not involve the constitutional interests implicated in a custodial setting.

In *Bradberry v. Pinellas County, supra,* a family of a boy who had drowned sued the county under Section

1983 for failing to adequately train the pool lifeguard. The Eleventh Circuit held that no cause of action existed since the decedent was not placed in a position of danger by County officials. "He was imperiled by his own voluntary act. . . ." *Id.* at 1517. The Eleventh Circuit then distinguished that case from a custodial setting case, stating,

> . . . there are times when the Constitution requires local governmental units to provide basic protective services to individuals with whom the government has created a special relationship. For example, jails and *mental hospitals* must be administered so that their occupants are housed in a safe manner . . . In the present case, however, there was no special relationship . . .

Id. at 1516, n.2 (emphasis added).

In *Rankin v. City of Wichita Falls, supra,* the family of a man who had drowned in a city treatment plant tank while working at the treatment plant sued the city. In holding that no Section 1983 cause of action existed, the Court also distinguished custodial setting cases, stating,

> This is not a case in which the government has exercised its power to incarcerate a citizen thereby making him dependent on the care of the state. *See, Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452.

Id. at 449.

In *Archie v. City of Racine, supra,* the plaintiff sued a fire department for failing to send a rescue squad. The issue in that case was the fire department's duty owed to the general public. The court held that under Section 1983, "an official's deliberate misuse of state power resulting in an infringement of the constitutionally protected right or interest is actionable under Section 1983." *Id.* at 489. The court further noted that reckless behavior

is actionable. *Id.* at 490. The court nowhere stated or implied that gross negligence or deliberate indifference does not violate the due process clause.

Petitioners' argument is all the more troubling because it is well established in the circuits cited by Petitioners that state officials' deliberate indifference or gross negligence in custodial settings to individuals' safety states a Section 1983 claim. *See, e.g., Taylor v. Ledbetter, supra,* at 793 (11th Circuit); *White v. Rochford, supra,* at 385 (7th Circuit) (indifference in the face of known dangers certainly must constitute *gross negligence*); *Bowers v. Devito, supra,* at 618 (7th Circuit) (state officials liable for failing to protect a person they have placed in danger).

VI

SANCTIONS SHOULD BE IMPOSED PURSUANT TO RULE 11

Rule 11 of the Federal Rules of Civil Procedure requires a court to sanction attorneys who submit pleadings which they know, or after "reasonable inquiry" should know, to be not "well grounded in fact," unwarranted "by existing law or a good faith argument for the extension, modification, or reversal of existing law" or "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Rule 11 was amended in 1983 to add new sanctions for violations of the Rule. This amendment was designed to encourage greater attention to pleading abuses and impose sanctions so as to discourage dilatory or abusive

tactics and help streamline the litigation process by lessening frivolous claims or defenses. (Advisory note to 1983 Amendment).

Rule 11 further provides that upon finding pleadings signed in violation of this rule, the court,

> Shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Pursuant to this rule, courts have sanctioned attorneys in a wide range of circumstances because the pleadings filed were frivolous or made without sufficient inquiry.

Admittedly, qualified immunity is an esoteric area of the law where the contours and boundaries are often not fully defined. However, Petitioners' misrepresentation of the facts and the applicable case law is unwarranted and unprofessional. The record demonstrates that this conduct is consistent with an apparent strategy on the part of Petitioners to harass and burden the Respondents and their attorneys while simultaneously delaying an eventual trial on the merits.

The District Court denied Petitioners' Motion for Summary Judgment recognizing that the law was clearly established and the counter declaration of William Schwartzman, M.D., raised triable issues of fact.

It is not the Ninth Circuit that has pronounced new law, but rather the Petitioners who are shamelessly inviting this Court to abandon precedent and provide state

hospital administrators with absolute immunity under the guise of qualified immunity while incompetence and gross neglect masquerade as professional judgment.

Dated: September 14, 1988

Respectfully Submitted,

JOHN HOUSTON SCOTT
Attorney for Respondents